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Francis R. Purdie v. The University of Utah et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

FRANCES R. PURDIE,

Plaintiff-Appellant,

vs.

THE UNIVERSITY OF UTAH, THE DEPARTMENT OF EDUCATIONAL PSYCHOLOGY of the University of Utah, CLAUDE W. GRANT, JOSEPH C. BENTLEY, ROBERT E. FINLEY, ADELAIDE FUHRIMAN, REED M. MERRILL, RALPH E. PACKARD, JAMES P. PAPPAS, MICHAEL J. PATTON, and JOHN DOES I through VII,

Defendants-Respondents.

Case No. 15208

BRIEF OF RESPONDENTS

AN APPEAL FROM THE DECISION AND ORDER OF DISMISSAL
IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE, DEAN E. CONDER, JUDGE PRESIDING

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A BRIEF IN SUPPORT OF THE DECISION AND ORDER OF DISMISSAL IN THE THIRD DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE, DEAN E. CONDER, JUDGE PRESIDING

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BRIEF OF RESPONDENTS

I

NATURE OF THE CASE

The plaintiff, Ms. Purdie, filed an action in the District Court of the Third Judicial District in the County of Salt Lake alleging that defendants had invidiously discriminated against her by denying her application for admittance to the counseling psychology program of the Department of Educational Psychology as a Ph.D. candidate. Plaintiff sought declaratory and injunctive relief

to prevent alleged discrimination solely on the basis of age in the defendants' admission procedures. The defendants answered denying that age was the sole criteria by which the plaintiff's application had been denied, that the plaintiff had failed to avail herself of the administrative remedies still available to her, and that even if age had been used as a criterion for admission an educational program, it would be reasonable in light of the limited resources available for educating persons in the field of Educational Psychology.

II

DISPOSITION IN THE LOWER COURT

The defendants moved to dismiss the complaint on the grounds that failed to state a cause of action, pursuant to Rule 12 (b) (6) of the Utah Rules of Civil Procedure. Upon stipulation of the parties, the factual allegations the plaintiff's complaint was deemed admitted for the purpose of the Motion Dismiss. The parties agreed that graduate education in Educational Psychology is a limited resource. The District Court held that "age" can be a fac in decisions such as admission to a graduate program and the use of this fa is not a denial of equal protection as guaranteed by the Constitution. The plaintiff appealed the dismissal of the complaint.

III

RELIEF SOUGHT ON APPEAL

Defendants-Respondents seek to have the decision of the lower court upheld.

IV

STATEMENT OF FACTS

In 1975, the plaintiff applied for admission to the Educational Psychology program as a Ph.D. candidate. At that time, she was 51 years old and had previously received a Bachelor's degree in Psychology/Sociology and also a Master's degree in Social Work, from the University of Utah. She was a certified social worker.

At the time of her application, Claude W. Grant, Joseph C. Bentley, Robert E. Finley, Adelaide Fuhriman, Reed M. Merrill, Ralph E. Packard, James P. Pappas, and Michael J. Patton were members of the Admissions Committee or faculty of the Department of Educational Psychology. Because of various conflicts, Ms. Fuhriman and Messrs. Grant and Packard did not participate in the sessions which dealt with the plaintiff's application. The Admissions Committee and the faculty of the Department of Educational Psychology had the responsibility to review applications for admittance to the counseling psychology program of the Department of Educational Psychology.

In the year that plaintiff applied, there were 125 applicants for 13 positions. It is readily apparent, and the parties have stipulated, that positions in the Ph.D. program in Educational Psychology constituted a limited resource. The applicants were broken down into four groups according to appropriate admission test scores and cumulative gradepoint averages. To provide a full, rich educational program consisting of diverse views and attitudes, one-half of

available positions were allocated to out-of-state students. In addition, sixty per cent (60%) of the positions were allocated to persons holding only bachelor degrees. Forty per cent (40%) of the positions are allocated to persons holding masters degrees. The plaintiff, being a resident of the state holding a masters degree was, in all likelihood, considered for one of the positions in the program. The plaintiff was not selected for one of the thirteen positions. The reasons for her nonselection were not limited to age. However, for the purposes of this appeal and the motion to dismiss in the court, the parties have stipulated that plaintiff's rejection was based on her

The plaintiff made application again for the fall term of 1977. At the same time she filed the above-mentioned action in the Third Judicial District Court requesting that the court declare that the policy and practice of the University of Utah, the Department of Educational Psychology, and all other defendants constituted discrimination against older applicants and was a denial of equal protection and due process. Plaintiff sought injunctive relief from practice in the future.

The defendants moved to dismiss the plaintiff's complaint on the ground that it failed to state a cause of action for which relief could be granted. For the purpose of that motion, and only for that purpose, the defendants stipulated that the allegations contained in plaintiff's complaint were true, that age was used as a criterion for evaluation of applicants to various educational programs of the University of Utah.

The court below rightly decided that age was a reasonable factor to use in allocating this limited resource. This decision was appealed.

V

ARGUMENT

POINT I

THE USE OF AGE AS A DETERMINANT FOR ADMISSION TO A GRADUATE LEVEL EDUCATIONAL PROGRAM DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE UTAH AND UNITED STATES CONSTITUTIONS

The United States Supreme Court has in several cases dealt with the difficulty of drafting legislation and implementing those enactments which have uniform operation with regard to all classes and individuals. Neither language, nor man's ability to carry out the purpose behind the language, is exact enough to affect only those persons for which the action was intended. Recognizing this, the Supreme Court has developed a two-tier approach to deal with cases where plaintiffs have complained that their right to equal protection has been trampled upon by the state. According to this rationale, states are given a wide latitude in formulating and effecting their policies, except where the states touch upon what the court calls "suspect classifications" or "fundamental interests". In those cases, the state action is examined with "struct judicial scrutiny". If, however, the classification does not invade a fundamental interest, or in some way touch upon a suspect classification, the court takes a deferential view of the state action and a "rational basis" standard of review

is used. (See McGown v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed 2d 393, (1961); Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L. Ed. 2d 491 (1970). In order for this court to view action by the Admissions Commitee with "strict scrutiny", there must be present some suspect classification, or a fundamental interest. In the instant case, there is neither.

A. Age is not a suspect classification.

The plaintiff claims that she was not allowed entry into the Ph.D. program of the Department of Educational Psychology because of an alleged policy of that department to deny entrance to older applicants. Even if this were such a classification would not, of itself, be a "suspect classification" according to the law as recently expounded by the U. S. Supreme Court.

The U. S. Supreme Court has listed those classifications which it regards as suspect. They include race, McLaughton v. Florida, 379 U.S. 85 S.Ct. 283, 13 L.Ed. 2d 222 (1964), alienage, Graham v. Richardson, U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 534 (1971); national origin, Ogama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948); illigitimacy, Weber v. Aetna Casualty and Surety, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed 2d 768 (1972). "Age" is not among these classifications.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973), the court gives a description of what is considered a suspect classification:

> [I]t is clear that appellant's suit asks that court to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness; the class is not saddled with such disabilities, or subjected to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Id at 28.

Older individuals are not "subject to such a history of purposeful unequal treatment" as are blacks, American Indians or Asian-Americans. They have not been denied the right to vote, nor excluded from the political process in any way. One need only look to the median age of the various legislative, executive, and judicial branches of the state and national government to see that older persons are not in such a position of "political powerlessness" that the court must look with "strict judicial scrutiny" at any action which tends to classify the older person differently than others.

The most recent U. S. Supreme Court decision looking into this matter is Massachusetts Board of Retirement, et al v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed. 2d 520 (1976) (hereinafter Murgia) which dealt with a Massachusetts statute requiring the retirement of all state troopers over 50 years of age. Mr. Murgia asserted that this constituted state action in violation to his rights guaranteed under the Equal Protection Clause. He asserted that age was a "suspect classification" and demanded the court examine with "strict scrutiny" the statute. The Supreme Court disagreed with him. In a per curium decision, the court held:

> Under the circumstances, it is unnecessary to subject the state's resolution to competing interests in this case to the degree of critical examination that our case under the Equal Protection Clause recently have characterized as "strict judicial scrutiny". (at 314)

The reason for the court's refusal to apply the strict scrutiny stan in this case was that it did not find age to be a suspect classification. As at 313:

> The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws a line at a certain age in middle life. But even old age does not define a "discrete and insular" group, United States v. Carolene Products Co., 304 U.S. 144, 152-153, N.Y. (1938), in need of "extraordinary protection from the majoritarian process". Instead, it works a stage that each of us will reach if we live out our normal span. Even if the statute could be said to impose a penalty upon a class defined as aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.

Several state and federal courts have also refused to hold age as a classification. This court, in Coleman v. Dept. of Employment Security B of Review, 29 Utah 2d 326, 509 P.2d 355 (1973) dealt with the issue of whe a section of the Employment Compensation Act (Title 35-4 UCA 1953) was constitutional. The Act required unemployment compensation to be reduc 50% of any amount received by the individual under a retirement plan whe employer and employee contributed. This section was held not constitu offensive to equal protection, even though obviously those who were mos ed by this statute were elderly persons.

In Everhart v. Knebel, 424 F. Supp. 390, 394, n. 6 (D. Conn. 1976), the court said:

> The plaintiffs do not and could not claim they are entitled to a more stringent standard of review. Age does not invoke that higher level of scrutiny.

Another statement made by the court in Taxpayers Association of Weymouth Township, Inc. v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976) follows this reasoning in stating that age is not a "suspect" criterion.

It is not difficult to see the reasons for the court's reluctances to hold age in the same "suspect classification" as it does, say, race. Race is an immutable characteristic determined solely by accident of birth. While considered superficially, age is also a quality fixed at birth which would not be changed except by the passage of time. But the difference lies in the fact that age and the aging process is something which has impact on everyone.

The reasons behind classifications based upon age are entirely different than those which gave rise to racial discrimination. In 1967, Willar Wirtz, then Secretary of Labor, testified before a House Subcommittee investigating the need for and scope of age discrimination in legislation:

> I would suggest that this kind of discrimination is entirely different from racial discrimination, the root of racial discrimination is pure bigotry. This is not true here. [Maste v. Great Lakes Steel Corp., 427 F. Supp. 1299, 1306 (E.D. Mich. 1976)]

We all pass through the various stages of life, each with its legal con-

sequences. Those under a certain age are excluded from public schools (Montana v. School District #1 of Fergus County, 348 P.2d 797 (Mont. 196 Younger persons are unable to vote or hold public office (Garent v. Brown, 341 F. Supp. 1187, 409 U.S. 809 aff'g mem. (S.D. Ohio 1972); Human Ri Party v. Secretary of State, 370 F. Supp. 921, 414 U.S. 1058 aff'g mem. Mich. 1973). When closely examined, these classifications exclude from torial franchise persons who may be mature enough to handle the political cisions necessary to fulfill the responsibilities of full-fledged citizenship. these individual exclusions are tolerated.

B. Admission to a graduate level educational program is not a fun mental interest.

The second trigger of strict judicial scrutiny of claims arising und Equal Protection Clause are those touching fundamental interests. The U. Supreme Court has held that education is not one of these "fundamental in ests". In San Antonio Independent School District v. Rodriguez, supra, a the court said:

> It is the province of this court to create substantive rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or impliedly guaranteed by the Constitution . . .
>
> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we

have said, the undisputed importance of education will not alone cause this court to depart from the usual standard for reviewing a state's social and economic legislation.

Justice Stewart, in his concurring opinion in Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600, commented upon "fundamental rights":

> The court does not 'pick out' particular human activities, characterize them as 'fundamental', and give them added protection . . . Contrary, the court simply recognizes, as it must, an established constitutional right, and give to that right no less protection that the Constitution itself gives. 394 U.S. at 642 (emphasis in the original)

The United States Constitution does not guarantee a right to education.

The Constitution of the State of Utah extends the right to education to a select group within the state; namely, children. Appellant does not fall within the benefited class.

> The Legislature shall provide for the:
>
> establishment and maintenance of a uniform system of public schools, which shall be open to all children of the state, and free from sectarian control. Constitution of Utah, Art. X, Sec. 1.

Contrary to the position advanced by plaintiff-appellant, the framers did not intend that the state's public schools be open to the entire population of the state. When a right was granted to the entire population of the state, terms such as "men" (Art. I, Sec. I), "people" (Art. I, Sec. 2 & 6), "person" (Art. I, Sec. 7) "citizens" (Art. IV, Sec. 1), are used. Certain specific privileges were directed at children. Public schools were to be open to children, Art. III & IV, Art. X, Sec. 31. In another context, the framers directed the legislature to

prohibit the employment of children in underground mines:

> The Legislature shall prohibit:
>
> (1) The employment of women, or of children under the age of fourteen years, in underground mines. Constitution of Utah, Art. XVI, Sec. 3.

Art. III and IV and Art. X, Sec. 1 of the Constitution of the State Utah were not intended to open the public schools to all persons. Had thi the intent of the framers, a term other than "children" would have been u describe the group. The framers' use of the term "children" in Art. III, graph 4 and Art. X, Sec. 1 and elsewhere in the Constitution granted pri to a specific group within the population, namely children, and did not gr privileges to the population generally.

This court has rendered a similar interpretation of Art. X, Sec.

In Logan City School Dist. v. Kowallis, 94 Utah 342, 77 P.2d 34 this court said:

> The requirement that schools must be open to all children of the state is a prohibition against any law or rule which would separate or divide the children of the state into classes or groups, and grant, allow, or provide one group or class educational privileges or advantages denied another. No child of school age, resident within the state, can be lawfully denied admission to the schools of the state because of race, color, location, religion, politics, or any other bar or barrier which may be set up which would deny to such a child equality of educational opportunities or facilities with all other children of the state. 77 P.2d at 350. (emphasis added

This interpretation by this court is consistent with other judicial ments. In the case of Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890),

ida court said:

> The word 'children' when used irrespective of parentage, may donate that class of persons under the age of twenty-one years as distinguished from adults, but its ordinary meaning with respect to parentage is sons and daughters, of whatever age. 7 So. at 142 (emphasis added)

In the case of State ex rel Slinkard v. Grebe, 249 S.W. 2d 468 (Mo. App. 1952), the Missouri court stated that the term "children" as used in an education statute had reference to school age children.

The Supreme Court of Appeals of Virginia took a similar position in Northrop, et al v. City of Richmond, 105 Va. 335, 52 S.E. 962 (1906).

To assert that the term "children" as used in Article X, Section I of the Utah Constitution included all persons within the state would lead to an absurd result. All persons within the state could thus assert that they had a constitutional right to attend law school or medical school, or any other public school of the state regardless of program capacity or individual qualifications. Such was certainly not the framer's intent.

The term "children" as used in Article III, Paragraph 4 and Article X, Sec. 1 does not include all residents of the state but establishes a distinct group for which access to the state's public schools is constitutionally protected. Appellants erroneously asserts that she is included within the group. Appellant, therefore, has no constitutionally protected right to admission to the state's public schools.

Neither does appellant have a right to education because it may lead to

employment. Employment in and of itself is not a right. Rather, individ
are protected from unjustified state interference with existing employme
lationships. See Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131
Smith v. Texas, 233 U.S. 30, 34 S.Ct. 681, 58 L.Ed. 1129 (1914).

Appellant had no fundamental right to admission to the Ph.D. prog
Educational Psychology at the University of Utah. Her complaint should, t
fore, be examined using the "rational basis" standard.

POINT II

GIVEN THE LIMITED RESOURCE OF GRADUATE EDUCATION IN EDUCATIONAL PSYCHOLOGY, IT WAS RATIONAL AND PROPER FOR THE RESPONDENTS TO ALLOCATE THIS RESOURCE ON THE BASIS OF AGE

The educational resources of the state of Utah are finite. The var
stitutions of higher education within the state receive the majority of their
tional funds through legislative appropriations. Structuring the academic
to obtain optimal use of state funds is a difficult process, requiring the ex
of the institution, the Board of Higher Education, the Board of Regents, a
Legislature.

This court has recognized the complex nature of the decision-maki
cess in education and has generally declined to reivew the conduct of educ
administration acting within the scope of their duties. In the early case of
v. Board of Education North Summit School District, et al, 81 Utah 51, 1
900 (1932), this court said:

> It is well established that, if the action of the board of education is within the powers conferred upon it by the Legislature, and pertains to a matter in which the board is vested with authority to act, the courts will not review the action of such a board to substitute its judgment for that of the board as to matters within its discretion. Security National Bank v. Bagley, supra; 24 R.C.L. 573; Schmidt v. Blair, 203 Iowa 1016, 213 N.W. 593, McClure v. Board of Education, 38 Cal. App. 500, 176 P. 711. 16 P.2d at 903 (emphasis added)

This court went on to attach a presumption of reasonableness at the acts of school administrators performed within the scope of their authority:

> The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law. So the courts are usually disinclined to interfere with regulations adopted by the school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board. Acting reasonably within the powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order, and discipline of the schools and the rules required to produce these conditions. The presumption is always in favor of the reasonableness and propriety of a rule or regulation duly made. The reasonableness of regulations is a question of law for the courts. 24 R.C.L. 575. See McQuillan, Municipal Corps. (2d Ed.) 421; McLeod v. State ex rel Colmer, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161. 16 U 2d at 903 (emphasis added)

This court will, therefore, not substitute its judgment for the judgment of university administrators when said administrators are acting within their scope of authority. Further, a presumption of reasonableness attachs if the questioned actions fall within the administrator's scope of authority. Applying this standard to the case at bar it is apparent that the lower court properly dismissed the complaint.

University presidents are given power over admissions at their respective institutions:

> Unless the board shall reserve to itself such action, the president of each institution with the approval of the Institutional Council:
>
> (5) May commit to the faculty of each institution, the general initiation and direction of instruction and of the examination, admission and classification of students . . . Sec. 53-48-15 (5), Utah Code Ann. (1953).

The exercise of this power over admissions is presumed to be reasonable, Beard v. Board of Education, (supra).

The U.S. Supreme Court has ruled that where state action is presumed reasonable such action will not be easily set aside.

> [The Equal Protection Clause] permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it. (McGowan v. Maryland, 366 U.S. at 425-426, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961) (emphasis added).

State action that is presumed correct will not be set aside "if any state of facts may be conceived to justify it". The state action in the case at bar this test. The parties have stipulated that graduate education in the Edu

Psychology field is a limited resource. It is not only reasonable but imperative that respondents allocate this resource to maximize the benefits to the state. The use of age as a factor in this allocation process is reasonable.

As put by the court of Weiss v. Walsh, 324 F. Supp. 75, 77 (SDNY 1971) 461 F.2d 846 (2d Cir. 1972), cert denied 409 U.S. 1129 (1973):

> Notwithstanding the great advances in gerontology, the era when advanced age ceases to be of some reasonable statistical relationship to the diminshed capacity or longevity is still in the future. It cannot be said, therefore, that age ceilings . . . are inherently suspect, although their applications will inevitably fall unjustly in the individual case.

The amount of time in which an individual can contribute to the state because of skills and knowledge gained in the Ph.D. program in Educational Psychology is directly related to age. The younger the graduate, the greater the projected time of contribution. Thus, generally speaking, the greater the time period of contribution to the state.

For example, A and B make application to the graduate program in Educational Psychology. A is twenty-five (25) and B is fifty (50). Both A and B are expected to live to age seventy-two (72). The graduate program is a two (2) year program. Upon graduation at age twenty-seven (27), A has forty-five (45) years in which his skill and knowledge are available to the state. At the time of B's graduation, only nineteen (19) years are remaining in which to contribute. In order to achieve the optimum allocation of this limited resource so as to maximize the benefit to the state, age may be a factor in the selection process.

The requisite facts are present to sustain respondent's action and t lower court properly dismissed the complaint.

CONCLUSION

Age is not a suspect classification. Neither does the appellant enjo constitutional right to education. The "rational basis" analysis is, therefo used to examine claims alleging Fourteenth Amendment violations. The re pondents' actions are presumed correct and the "rational basis" test is sat fied if any state of facts can be reasonably conceived to justify the actions. limited resource of graduate education and the attendent need to efficiently cate this resource so as to maximize the benefit to the state justifies allo on the basis of age.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Respondents to Brian M. Barnard, Attorney at Law, 214 East Fifth South, Salt Lake City, Utah 84111, and Mike Shepherd, Attorney at Law, 216 East Fifth South, Salt Lake City, Utah 84111, postage prepaid in the United States Postal Service this 11th day of October, 1977.

Mildred E. Martinez
Secretary